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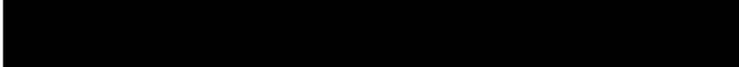
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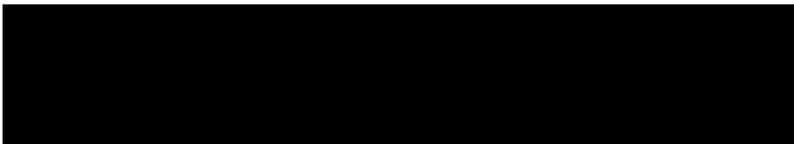


FILE: EAC 06 162 52460 Office: VERMONT SERVICE CENTER Date: **MAR 19 2008**

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a computer software consulting company that seeks to employ the beneficiary as an SAP business analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director determined that the petitioner did not demonstrate that it had H-1B caliber work available for the beneficiary during the three-year time period sought by the petitioner in the Form I-129 petition at the location noted on the Labor Condition Application (LCA), and the petition was not, therefore, approvable. On appeal the petitioner submits a brief and additional information contending that the proffered position qualifies as a specialty occupation, and that the petitioner has H-1B caliber employment available for the beneficiary in the United States.

The issue to be determined is whether the petitioner will employ the beneficiary in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary’s services as an SAP business analyst. Evidence of the beneficiary’s duties is set forth in the Form I-129 petition and supporting attachment. According to evidence provided by the petitioner the beneficiary would:

- Enterprise resource planning (SAP Applications) implementation;
- Design analysis and implementation of SCM, inventory, purchase and order fulfillment modules of SAP-ERP;
- Prepare and analyze FRS (Functional Requirement Specification);
- Analyze and provide solutions to post implementation issues in the area of sales and distribution configuration, integration and testing;
- Design reports and user-defined screens for customization of ERP components;
- Evaluate the CRM solutions and provide support to end-users whenever necessary in Ramco e.applications;
- Map the To-Be process in context of RAMCO and other IT projects for SD;
- Configure and carry out prototyping for new ERP implementations;
- Identify and analyze gaps for ERP implementations;
- Develop and design strategies for data collection for uploading into ERP implementation;
- Adhere to project management methodologies and follow PMI principles;
- Understand the existing structure and business processes of the organization and relate same with the standard processes of SAP;
- Reorganize existing structures and processes and implement same in the R/3 System by way of configuration and customization;

- Perform customization and implementation of SAP R/3 4.6C Project Systems, and controlling modules;

Implement PS, CO modules including business blue print and system configuration;

- Apply change requests to SAP to suit the business needs and meet growing business requirements;

Ensure that peer review is conducted on functional and development objects, validate and approve security role assignment;

- Provide production support and perform break fixes to run the business smoothly; and

- Undertake process audits, report findings and ensure timely and effective close out of any issues.

In the director's decision, he noted that the petitioner had not provided copies of client contracts under which the beneficiary would perform services for the petitioner's clients during the term of employment sought in the Form I-129 petition. Essentially, the director indicated that the petitioner had not provided a complete itinerary<sup>1</sup> for the beneficiary's work to be performed from October 1, 2006 through September 30, 2009. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In its response to the director's request for evidence, the petitioner did not provide copies of client contracts establishing a complete itinerary for the beneficiary, stating that the beneficiary will work on in-house projects at the petitioner's business location. On appeal, the petitioner provided a copy of a master services agreement with a client and a statement from the client stating that it had three open work orders with the petitioner for programmer analysts specializing in SAP applications, implementation, configuration, integration and testing. No work orders were provided, however, detailing the specific duties to be performed under the work orders, the specific employee who would provide any such services, the location of any work to be performed, or the length of time expected to complete the work order. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. The documentation contained in the record does not establish a complete itinerary for the beneficiary from October 1, 2006 through September 30, 2009. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.<sup>2</sup>

The beneficiary's position has been identified by the petitioner as a programmer analyst. The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that although there are many training paths

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<sup>1</sup> See Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

<sup>2</sup> As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

available for programmers due to varied employer needs, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. In the absence of a degree, substantial specialized experience or expertise may be needed, and employers appear to place more emphasis on previous experience even when hiring programmers with a degree. Some computer programmers hold a college degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement degrees in other fields. Thus, it is evident that while some programmer positions justify the hiring of an individual with a baccalaureate level education, others require only an associate's degree or some other form of certification.

The petitioner states on one hand that the beneficiary will work on in-house projects at its work location, but also provided information stating that the beneficiary would provide services for one of its clients pursuant to a master services agreement. The petitioner, however, has provided no contracts, work orders or statements of work from any petitioner client for whom the beneficiary will actually perform services specifically describing the duties the beneficiary would perform and, therefore, has not established the proffered position as a specialty occupation. Further, the petitioner did not provide evidence of any in-house projects on which the beneficiary would perform services so it is impossible to determine the nature or complexity of any duties to be performed by the beneficiary in-house. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)).

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. As the record does not contain sufficient documentation from the end users of the beneficiary's services (the petitioner's clients) that establish the specific duties the beneficiary would perform under contract, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition must be denied.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to sustain that burden.

**ORDER:** The appeal is dismissed. The petition is denied.